is no doubt Murray-Aynsley C.J. would have decided otherwise if a similar provision existed.

We are concerned with a situation where a person's right to institute a cause of action had already expired when the amending Act enlarging time came into operation. If there were no amendment there could be no doubt at all that any action instituted would be time-barred. The amending Act has not altered the position. Very much the same thing was said in *Maxwell* v. *Murphy*[6] by Williams J. in a passage cited by this court in *Bas Mara's* case.[1]

Appellant's claim for damages is based on the provisions of the Civil Law Act, 1956. In order to obtain that remedy the old Act conferred upon him the right to sue within twelve months from the date of the incident. Since he failed to do so within the period he was time-barred. The right under the old Act was conditional upon an action being brought within the allotted time and upon the lapse of that time the right was gone. The new Act came into force some nine months later and could not in any way revive a right which expired. Having regard to the circumstances the new Act in enlarging the time for institution of action could not be regarded as merely procedural.

The same question of construction came up for consideration in the *Bas Mara's* case[1] and the present appeal. It is whether the claim which commenced after the twelve-month period under the old Act and therefore time-barred could be revived by the new Act which enlarged the time to thirty-six months. To answer the question the court has to determine whether the new Act affects procedure matter or substantive rights. If the amendment made by the new Act were regarded as merely procedural it would operate retrospectively. On the other hand, if it were regarded as affecting substantive rights, question of retrospectivity would not arise. We would refer to the observation of this court in *Bas Mara's* case[1] that: —

"The distinction between procedural matters and substantive rights must often be of great fineness. Each case therefore must be looked at subjectively; there will inevitably be some matters that are classified as being concerned with substantive rights which at first sight might be considered procedural and vice versa."

The distinction is so fine it is difficult to draw a dividing line. There are no clear guidelines. Whether the new Act affects procedure or rights depends upon the nature of the new Act. A substantive right may be secreted in the interstices of procedure. It has to be recognised that a change might be described as procedural in character yet may nevertheless affect a vested right adversely. We would repeat what was said by this court in *Bas Mara's* case[1] that the new Act was not truly procedural but affected vested rights and that the time for instituting the claim was not enlarged by the new Act. In other words, the new Act is not retrospective in operation and has no application to a cause of action which was time-barred being before the new Act was introduced. Not only on merits but also on question of law appellant cannot succeed. We would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Murphy & Dunbar.*

TAN SUAN SIM v. CHANG FOOK SHEN

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) December 5, 1979 & March 8, 1980]

[Penang — Federal Court Civil Appeal No. 51 of 1979]

Land Law — Conveyancing — Practice under Torrens System — Agreement for sale of land — Balance of purchase price to be paid at a later date — Completion — Balance to be paid on approval of loan from bank — Refusal to complete — Specific performance.

Evidence — Contract in writing — Completion at "a later date" — Oral evidence to explain latent ambiguity — Evidence Act, 1950, ss. 92(f) and 95.

This was an appeal from the decision of Gunn Chit Tuan J. reported in [1980] 1 M.L.J. 105. The appellant had agreed to sell to the respondent her land and house. The appellant paid the sum of $2,000 as deposit and it was agreed that the balance of the purchase price was to be paid "at a later date." It was understood that the balance would be paid when the respondent obtained a loan from the bank and that the house the subject matter of the purchase was to provide the security for the loan. The appellant however insisted on payment of the balance before execution of the transfer and demanded payment "on or before June 10, 1974" failing which the appellants purported to cancel the contract. The respondent applied for specific performance of the agreement and in the High Court it was held that the respondent in this case was in a position to perform the contract and should have been given reasonable time to do so. In the circumstances specific performance of the contract was ordered. The appellant appealed.

Held, dismissing the appeal: on the evidence and in the circumstances of this case, it is clear that "a later date" meant in the intention of the parties a reasonable time after the loan had been approved and as it appeared that the appellant was not willing to complete, the learned trial judge was correct in ordering specific performance.

Case referred to:-

(1) *James* v. *Smith* [1931] 2 K.B. 317, 322.

FEDERAL COURT.

T.R. Hepworth for the appellant.

R.J. Manecksha for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The agreement in writing for the sale of a house by the appellant to the respondent is simplicity itself. It reads

"I, Puan Tan Suan Sim has agreed to sell the house of No. 38, Fettes Road, Penang, Lot 609 NED PG. Mk. 18, to Mr. Chang Fook Shen of 4, South Avenue, Penang at dollars Thirty four thousand five hundred ($34,500) with vacant possession.

I have also received a sum of two thousand ($2000 cheque 610635) as an initial payment. The balance to be paid at a later date.

The initial (sic) is to be refunded if the grant is not clear. Dated 14.7.3."

But simplicity is not the sole desideratum of legal draftsmanship or in any document spelling out the legal relationship between the parties to it. In this agreement clearly drawn up by the parties without benefit of proper legal advice, a difficult matter of interpretation lies in the use of the phrase "a later date." When this uncertain provision is set out amidst serious disputes of fact, it assumes grave complexity. But the learned judge (Gunn Chit Tuan J.) at the end of the hearing had no difficulty in ordering specific performance.

He clearly disbelieved the appellant and it would

appear that one of his reasons was the recission of the agreement made or attempted to be made by the appellant in her solicitors' letter of July 27, 1973 charging the respondent with failure to carry out his side of the bargain to exchange his house No. 1 South Avenue Penang for hers and pay a further $1,350. This allegation though repeated in a further letter of August 3, 1972 was not however pursued in the statement of her defence filed in answer to a claim for specific performance and consequently it did not arise for consideration by the trial court.

What came up for consideration was the question of the time for the completion of the purchase. The appellant purported by letter on May 30, 1974 to appoint June 10, 1974 for the payment of the balance of the purchase price and when that day passed without the money having been paid over, purported to rescind the agreement by letter dated June 13, 1974. The contention for the appellant was that time was by reasonable notice made of the essence and the respondent was the party in breach of the agreement.

At the High Court, evidence was led, without objection by appellant's counsel, in our view, very correctly, that it was explained, if not earlier, at least before the rescission of the agreement, that the respondent could pay the balance only on obtaining a loan from a bank, and that the house, the subject-matter of the purchase and the litigation, was to provide the security for this loan. The respondent himself testified that he had told the respondent of his requirement of a loan for completion of the purchase. The appellant was said to be agreeable to wait until the loan was approved which was in July 1974.

This evidence, admitted as we have said without objection, is clearly admissible under sections 92(f) and 95, Evidence Act to explain the latent ambiguity in the agreement. It established beyond peradventure that by consensual agreement, the completion for the purchase was to be a reasonable time after the bank had approved of the loan. And it also established again beyond peradventure that within the definition of ability to pay by Atkin L.J. in *James* v. *Smith*[1] at page 322 which is in these words

> "I think that 'ability' does not depend upon whether the purchaser has the money in hand at the time; to my mind it is a question of fact. I do not think it depends upon whether he has a binding agreement by which some third person is obliged to provide him with resources to carry out the contract. I think it is sufficient if it is proved by the agent or by the purchaser that the circumstances are such that if the vendor had been ready and willing to carry out his contract, he on his part at the proper time could have found the necessary money to perform his obligation"

the respondent was able to perform his part of the agreement and complete the purchase.

The loan was processed on July 14, 1973 and when the parties resusticated the application, approved, impliedly, in April 1974. Having regard to the respondent's ability to pay the balance of the purchase price, what was the difficulty that led to the purported rescission in June 1974?

From the record, it is abundantly clear that the difficulty arose from the refusal of the appellant qua vendor to sign any transfer of the land without first receiving the money for the sale and the refusal of the bank not to release the money before a proper transfer and charge had been executed. In this impasse, the sale stagnated.

It did not appear to have been sufficiently realised and the appellant was unfortunate in not realising for herself or in not obtaining the proper advice that in the Torrens system of registration of titles, the property does not pass until the transfer has been effectively registered against the issue document of title in the relevant registry of titles. For this reason, it is not merely the usual practice but an almost inevitably necessary requirement in any agreement of sale under the Torrens system to appoint a stakeholder, who, need not be but is ordinarily the solicitor for the vendor and who undertakes to hold the money which would be paid over by the purchaser upon the execution of the relevant transfer until the registration of the transfer, when he would pay it to the vendor. If for any reason the registration is not effected or proceeded with, then his undertaking would be to return the money to the contending purchaser. For the same reason, where the money is to be paid by a third person, e.g. a chargee as the bank in this case, who would require a charge to be executed by the purchaser to secure the repayment of the loan, the appointment of a stakeholder would be just as necessary and his undertaking would be to retain the money until the transfer and the charge had been registered and after that to pass the money over to the vendor, since the transfer and the charge would ordinarily be registered at the same time, one immediately after the other. All this is elementary conveyancing practice under the Torrens system.

In this case, the solicitors for the bank had been unusually generous in only requiring the solicitor for the vendor to hold the money only until the execution of the transfer. They did not require the solicitor to wait until registration. This risky but generous attitude on the part of the bank should have assisted matters considerably. But the vendor is required to have faith in her solicitors. Either she did not have that faith or she was not properly advised that there could be nothing objectionable to the use of a stakeholder. In the event she did execute a transfer but her then solicitor made no effort to act as a stakeholder or to explain to her that the only way out of the *impasse* presented not only by the parties but by the requirement of the Torrens system itself is the employment of a stakeholder. Clearly she executed the transfer on advice by her solicitor as an empty gesture to indicate her willingness to carry through the sale.

We note that the advice she received from the several solicitors she went to and who are practising in Penang, was that it was the usual practice to receive the balance of the purchase price on the signing of the transfer. That might have been correct in the previous system of the registration of deeds practised in Penang until the conversion in 1966 to the Torrens system but it makes the present system workable only if the solicitors for the purchasers and chargees are willing to put themselves professionally and personally at risk. The present system can work only if practi-

tioners realise fully its implications and advise their clients accordingly.

On the evidence and in the circumstances of this case, it is clear that "a later date" meant in the intention of the parties a reasonable time after the loan had been approved and it is an irresistible conclusion that the appellant had never been willing to complete.

For these reasons, we agree with the judgment for specific performance but the further order that the Senior Assistant Registrar of the High Court be empowered to execute the transfer on behalf of the appellant should be qualified by a provision that this order is to take effect upon her refusal or failure to do so. There should also be a further order that the balance of the purchase should be paid into court upon the execution of the transfer by the appellant or by the Senior Assistant Registrar on her behalf and the due registration of the transfer and the charge.

Subject thereto, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Ajmer Singh Sandhu & Co.*

DAISHOWA (M) WOOD PRODUCTS SDN. BHD. v. KEPONG WOOD PRODUCTS CO. SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) November 7, 1979 & February 26, 1980]
[Kuala Lumpur — Federal Court Civil Appeal No. 133 of 1977]

Contract — Breach — Damages — Quantum of damages — Whether appellate court should interfere with assessment of trial judge — Damages for anticipated loss of profit — Agreement unlikely to be renewed — Loss of profit during renewal period not loss reasonably forseeable as liable to result from breach — Deduction for tax — Whether award trading receipt or capital payment — Damages reduced — Contracts Act, 1950, s. 74.

Revenue Law — Damages for breach of contract — Whether trading receipt or capital payment — Tax liability — Whether damages should be reduced — Income Tax Act, 1967, s. 4.

This was an appeal from the decision of Abdul Hamid J. reported at [1979] 1 M.L.J. 195. At the hearing of the appeal liability was admitted and it was conceded that the appellants were not entitled to terminate the agreement and that the respondents were entitled to damages under section 74 of the Contracts Act. The only question on the appeal and the cross-appeal was the quantum of damages. The main contention of the appellants was that the learned Judge did not deal with tax and did not take this into account in awarding damages.

Held: (1) on the facts the learned trial judge was right in finding that the agreement was unlikely to be renewed. The loss of profit during the renewal period could not therefore be said to be a loss reasonably forseeable as likely to result from the breach and the learned trial judge was right to dismiss the respondent's claim for damages for anticipated loss of profit during the renewal period;

(2) in the present case the payment to the appellants was more in the nature of capital payment than of trading receipts. Once the appellants terminated the contract the structure of respondent's business was affected and their business virtually came to an end;

(3) the estimate of damages by the learned trial judge was erroneous due to the omission to make any deduction for tax and the respondents were therefore awarded more than they were entitled;

(4) the amount of damages awarded should be reduced by $250,000.

Cases referred to:-

(1) *Hadley* v. *Baxendale* (1854) 9 Ex. 341; 156 E.R. 145.
(2) *Victoria Laundry (Windsor)* v. *Newman Industries Ltd.; Coulson & Co. Ltd. (Third Parties)* [1949] 2 K.B. 528.
(3) *In re Vic Mill Ltd.* [1913] 1 Ch. 465.
(4) *Silkstone and Dotsworth Coal and Iron Co. Ltd.* v. *Joint Stock Coal Co. Ltd.* (1876) 35 L.T.R. 668.
(5) *Interoffice Telephones Ltd.* v. *Robert Freeman* [1958] 1 Q.B. 190.
(6) *Robophone Facilities Ltd.* v. *Blank* [1966] 3 All E.R. 128.
(7) *British Transport Commission* v. *Gourley* [1956] A.C. 185.
(8) *Beach* v. *Reed Corrugated Cases Ltd.* [1956] 1 W.L.R. 807.
(9) *Hall & Co. Ltd.* v. *Pearlberg* [1956] 1 W.L.R. 244.
(10) *West Suffolk County Council* v. *W. Rought Ltd.* [1957] A.C. 403.
(11) *Inland Revenue Commissioners* v. *Newcastle Breweries* (1927) 12 T.C. 927.
(12) *J. Gliksten & Son* v. *Green* [1929] A.C. 381.
(13) *I.B. Drennan* v. *R.F. Greer* [1957] M.L.J. 77.
(14) *S.R. Fox* v. *Ek Liong Hin Ltd.* [1957] M.L.J. 1.
(15) *Raja Mokhtar bin Raja Yaacob* v. *Public Trustee Malaysia* [1970] 2 M.L.J. 151.
(16) *Yeap Cheng Hock* v. *Kajima-Taisei Joint Venture* [1973] 1 M.L.J. 230.
(17) *Raja's Commercial College* v. *Gian Singh & Co.* [1975] 1 M.L.J. 54.
(18) *Barr, Crombie & Co. Ltd.* v. *C.I.R.* 26 T.C. 406, 412.
(19) *De Lasala* v. *De Lasala* [1979] 3 W.L.R. 390.
(20) *Lim Poh Choo* v. *Camden and Islington Area Health Authority* [1979] 3 W.L.R. 44.
(21) *Flint* v. *Lovell* [1935] 1 K.B. 354, 360.
(22) *Davies & Anor.* v. *Powell Duffryn Associated Collieries Limited* [1942] A.C. 601.
(23) *Nance* v. *British Columbia Electric Railway Company Ltd.* [1951] A.C. 601.

FEDERAL COURT.

Peter Mooney for the appellant.

M. Shanker (*E. Yong* and *S. Woodhull* with him) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This appeal is against the decision of the learned judge in awarding $938,745.14 as damages for breach of contract.

Both appellants (Daishowa) and respondents (Kepong Wood) are companies incorporated in Malaysia. Respondents operated a factory at 6¾ Mile Kepong, Kuala Lumpur. In 1970 appellants had installed two chipping plants in the factory. It was not until January 17, 1974 that they entered into a written agreement whereby appellants agreed for a period of five years to purchase all wood chips produced by respondents on certain terms and conditions. The agreement was renewable at the option of either party giving two months' notice to the other. Clause 2 states that respondents are responsible for all costs of producing wood chips and maintenance of the plants. Under Clause 3 the purchase is stated to be $18 per long ton of 2,240 lbs. but shall be increased propor-